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Comptroller General
of the United States
Washington, D.C. 20548

**Matter of:** Chaffins Realty Company, Inc.

**File:** B-247910.3

**Date:** June 8, 1993

Charles S. Christy, Esq., Christy and Lemire, for the protester.
Michael F. King, Department of Agriculture, for the agency.
Richard P. Burkard, Esq., and Roger H. Ayer, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Where contracting agency did not provide protester/incumbent contractor with a copy of solicitation for office space because, in the agency's view, the firm would be unable to offer space that would be considered more advantageous than that offered by the awardee, incumbent contractor was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984 requirement for full and open competition.

**DECISION**

Chaffins Realty Company, Inc. protests the award of a lease to the Medical Center of Central Massachusetts (MCCM) under solicitation No. SCS-09-MA-92, issued by the Department of Agriculture for approximately 3,500 net usable square feet of office space to house the Soil Conservation Service and the Agricultural Stabilization and Conservation Service in Holden, Massachusetts. Chaffins argues, essentially, that the agency improperly denied it an opportunity to submit an offer for this requirement.

We sustain the protest.

This procurement represents the agency's second attempt to procure the office space in Holden. On January 30, 1992, the agency issued solicitation No. SCS-03-MA-92 for the same requirement. Under that solicitation, the agency received three best and final offers (BAFOs) by February 28, including ones from Chaffins and MCCM. Chaffins, the incumbent contractor, offered the building that the agency had occupied for more than 20 years. The agency conducted an evaluation of the three offers and concluded that MCCM's offer of the Holden Walk-In Center was the most

advantageous, even though it was the highest priced. The agency found Chaffins' offer, which was the lowest priced, to be the least desirable of the three offers received. On March 2, the agency awarded the lease to MCCM, the highest priced offeror, for space at the Holden Center. Chaffins protested the award. On July 8, we denied the protest finding that the agency had a reasonable basis for its selection of the Holden Center. Chaffins Realty Co., Inc., B-247910, July 8, 1992, 92-2 CPD ¶ 9.

Following our decision, MCCM attempted to obtain building permits to prepare the Holden Center for the agency's occupancy, but was unable to do so.[1] Since MCCM was unable to proceed with required renovations, the agency never executed a lease with MCCM for that space. Instead, MCCM offered the agency alternate office space at MCCM's adjacent Medical Arts Building, which the agency accepted. The agency executed the lease for that space on October 8. Chaffins filed a second protest objecting to the agency's acceptance of the substitute office space.

The agency reported that it selected the new building as a result of a new contract action pursuant to the General Services Administration (GSA) "Expedited Procedures for Acquisition of Leasehold Interests in Real Property."[2] Under these procedures, the agency issued a new solicitation, No. SCS-09-MA-92, which it provided only to MCCM. The agency advised that it attempted to identify alternate locations which would meet its space needs after MCCM offered the alternate office space but found none, and stated that the alternate space in the Medical Arts Building was compared to the three offers received under the previous solicitation. The agency concluded that MCCM's alternate space was superior to the space MCCM initially offered at the same price per square foot. On this basis, the agency determined that the alternate space was the most advantageous location available. In light of the agency's explanation that the award to MCCM for the Medical Arts Center was essentially a new award decision resulting from a new solicitation, and not an action under the earlier

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[1]New building permits were not issued to MCCM as a result of community opposition to the conversion of the Holden Center from hospital to office space.

[2]These procedures, set forth in a GSA memorandum dated August 26, 1991, provide streamlined procedures for certain types of leases, including leases over $25,000, but less than 10,000 square feet. The same procedures, as amended, appear at subpart 570.3 of the General Services Administration Acquisition Regulation. 48 C.F.R. § 570.301 et seq. (1992).

solicitation, we dismissed Chaffins' second protest as academic on February 8, 1993.

In response to the information provided by the agency in response to its earlier protest, Chaffins filed this protest on February 1, 1993, alleging that the agency improperly denied it an opportunity to compete under the new solicitation. We agree.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988 and Supp. III 1991), requires contracting agencies to obtain full and open competition through the use of competitive procedures. "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. 41 U.S.C. § 103(6); Professional Ambulance Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145. In this regard, contracting agencies generally must solicit their satisfactorily-performing incumbent contractors. Id.; see Federal Acquisition Regulation § 14.205-4(b).

Chaffins was improperly denied a copy of the solicitation in violation of CICA's requirement for full and open competition. See Nevada Fed. Centre, B-225954, Mar. 30, 1987, 87-1 CPD ¶ 362 (agency improperly failed to solicit incumbent lessor based on agency's incorrect belief that incumbent was unable to meet increased space requirements). As stated, Chaffins had provided the agency with office space for over 20 years and under the previous solicitation submitted the low-priced, acceptable offer. While we found the agency's decision not to select that offer to be reasonably based, we did not find, nor did the agency argue, that the space offered by Chaffins did not meet the agency's minimum needs. Since the record shows that Chaffins, the incumbent contractor, clearly expressed an interest in providing acceptable and less expensive space than the alternate space offered by MCCM, the agency was required to provide the firm with a copy of the solicitation and allow it to submit an offer. See generally, 48 Comp. Gen. 722 (1969) (regardless of stale data showing premises unacceptable without an upgrade, agency should have solicited incumbent lessor and afforded it an equal opportunity to compete).

The agency argues that its failure to provide the protester (or any other potential offeror other than MCCM) with a copy of the solicitation was justified under the authority of the GSA "Expedited Procedures for Acquisition of Leasehold Interests in Real Property." We do not read these procedures as providing an exception to the competition requirements of CICA or as otherwise limiting the agency's obligation to comply with CICA's mandate for full and open competition. Indeed, the expedited procedures assume full

and open competition for small leases over $25,000 since they expressly provide that "[i]f circumstances exist that support an other than full and open competition (OTFOC) leasing action, a justification must be prepared and approved, as necessary, for all [leases over $25,000]." See also 48 C.F.R. § 570.304-4. The agency's position that its actions were unobjectionable because it substantially complied with the expedited procedures is without merit since, regardless of the agency's compliance with them, it still was obligated to comply with CICA's requirement for full and open competition.

The agency next contends that Chaffins was not prejudiced by its failure to provide the protester with a copy of the solicitation because "the protester would have submitted an unacceptable offer had it known of the second solicitation." The agency argues that it had already inspected and evaluated Chaffins' space and therefore "no useful purpose would have been served by a re-inspection and re-evaluation of the space." The agency states that the offer submitted by Chaffins under the earlier solicitation was ranked third technically among those received, and speculates that an offer of the same space over 7 months later in response to the instant solicitation would place Chaffins in no better position. The agency concludes that Chaffins was not prejudiced by the agency's actions here.[3]

The record does not support the agency's position that Chaffins would have submitted an unacceptable offer had it been given an opportunity. The agency evaluators did not conclude during the previous evaluation that Chaffins' offer was unacceptable; rather, the award decision was based on the superior technical ratings assigned to MCCM for the Holden Center space. We therefore cannot conclude that the protester--which submitted the lowest-priced acceptable offer under the prior solicitation--would have been unable to submit an acceptable offer under the new solicitation.

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[3]The agency also argues, for the same reasons, that Chaffins lacks the requisite direct and substantial economic interest to be considered an interested party within the meaning of our Bid Protest Regulations. 4 C.F.R. § 21.0 (1993). Where, as here, a protester is denied the opportunity to compete for a contract and asserts a reasonably demonstrated interest in competing, we generally consider such a protester to have a sufficient interest to warrant consideration of its protest. See Afftrex, Ltd., B-231033, Aug. 12, 1988, 88-2 CPD ¶ 143. We therefore consider Chaffins to be an interested party to maintain this protest. See also MCI Telecommunications Corp., 70 Comp. Gen. 20 (1990), 90-2 CPD ¶ 280.

We also question the agency's speculation that, in spite of Chaffins' demonstrated ability to submit a low-priced technically acceptable offer, the firm would not have had a reasonable chance for award. If allowed to compete under the new solicitation, Chaffins would have had an opportunity to improve the competitiveness of its proposal such as by lowering its price or offering upgrades. There is nothing in the record to suggest that it would not have done so. In our view, the possibility that the protester would have been in contention for an award is sufficiently high in this case to justify sustaining the protest. See Applied Construction Technology, B-251762, May 4, 1993, 93-1 CPD ¶ ___ (protest of agency's failure to solicit protester sustained notwithstanding agency's argument that protester's unreasonably high-priced bid under previous small business set-aside demonstrated that the protester would not have submitted a competitive bid for the unrestricted resolicitation).

As the protester points out, seven months after receiving acceptable offers from three firms for the identical requirement, the agency simply renegotiated "with MCCM for a different building without due regard or concern for any other offeror." We note that the award here was made, without the benefit of competition, at a price that was more than 30 percent higher than Chaffins' previous price and more than 10 percent higher than the other previously acceptable offer. In our view, Chaffins' participation would also have furthered CICA's goal of assuring that the government receives the lowest possible price. Professional Ambulance Inc., supra.; Abel Converting Inc. v. United States, 679 F. Supp. 1133. Excluding Chaffins (and other firms) not only eliminated the possibility of obtaining a lower price from Chaffins, but also eliminated the competitive environment which could have resulted in obtaining a lower price from other offerors, including the awardee. See Davis Enters., B-249514, Dec. 4, 1992, 92-2 CPD ¶ 389.

Accordingly, we conclude that the agency's failure to solicit an offer from Chaffins was improper. Since MCCM's lease does not contain a termination for convenience clause, we cannot recommend the termination of MCCM's present lease,

and no other corrective action is appropriate, Nevada Fed. Centre, supra. Nevertheless, Chaffins is entitled to recover the costs of filing and pursuing its protest, 4 C.F.R. § 21.6(d)(1) (1993), and should file its claim for costs, detailing and certifying the time expended and costs, with the agency within 60 days. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

for James F. Hinchman
Comptroller General
of the United States